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SUPREME COURT, U.S.

CASE NO. A-275 83-904

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1983

THE STATE OF OHIO,

v.

KENNETH M. JOHNSON,

On Writ of Certiorari to the Supreme Court of Ohio

BRIEF OPPOSING PETITION FOR CERTIORARI

Albert L. Purola
Counsel of Record
38052 Euclid Avenue
Willoughby, Ohio 44094
(216) 951-2323

Attorney for Respondent.

ARGUMENT OPPOSING THE GRANTING OF CERTIORARI

As this Court knows, Ohio is a so-called syllabus state, meaning that the law of any case decided by the Supreme Court of Ohio appears only in the syllabus of the Opinion which is prepared by the Court itself. *Beck v. Ohio*, 379 U.S. 89 (1964), at 93, n. 2.

The two syllabi of the present case make no reference to any provision of the federal constitution and it is clear from reading them that the judgment below rests on an independent and adequate state ground which denies this Court the jurisdiction to review it. *Fox Film Corp. v. Muller*, 296 U.S. 207 (1935).

The state ground involved is Revised Code Section 2941.25(A) (which is printed in the appendix to the petitioner's brief). In that statute the Ohio legislature has provided for the treatment of fact situations, like this one, where the conduct of a person can be construed to amount to two or more allied offenses of similar import.

While a person in Ohio can clearly be charged with all offenses arising from his act, he may only be convicted of one. In this case, then, if Mr. Johnson had gone to trial on this four-count indictment and been convicted of all charges, two convictions would have to have been set aside by the trial judge under Revised Code Section 29451.25(A). However, at that point it does not take much insight to figure out which two would be set aside and which two would be enforced.

By pleading guilty at the arraignment, Kenneth Johnson made the decision himself instead of letting the prosecutor or the trial judge make it.

This case, as far as the Ohio Supreme Court is concerned, involves only interpreting and applying a state statute and does not involve interpreting the Double Jeopardy Clause in a manner other than in conformity with this Court's decisions.

Because of the adequate, independent state ground supporting the decision below, this Court does not have jurisdiction to grant a writ of certiorari.

The petitioner's basic complaint is not even disguised in its petition to this Court: Dissatisfaction with the trial judge and the acceptance of the pleas of guilty. At page 6 of the petition, the state's counsel has written: "But rather, the Defendant-Respondent has, through an errant trial court's abuse of discretion, been allowed to plead guilty to the crimes of his choice, . . ."

Even if that were a proper characterization of what happened, this Court is not in the business of correcting 'errant trial court[s]'.

In fact, the decision below is correct and it achieved the correct result.[1] The following, from the Opinion of the Supreme Court of Ohio, disposes of the controversy:

> The state cannot now be heard to complain about this result as it created the problem by charging the accused with double offenses where only one conviction was possible. [2]

Nothing in this petition or in this case commends itself to the discretionary granting of a writ of certiorari. The writ must be denied.

Albert L. Purola
Counsel of Record
38052 Euclid Avenue
Willoughby, Ohio 44094
(216) 951-2323

Attorney for Respondent.

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1. The respondent does not concede that *Ashe v. Swenson*, 397 U.S. 436 (1970) has no application to a proper analysis of the facts here. That, however, is even more reason to deny the writ.

2. 6 Ohio St. 3d 420 at 424.

CERTIFICATE OF SERVICE

I hereby certify that the requisite number of copies of the foregoing Brief Opposing Petition for Certeorari have been served on the petitioner, State of Ohio, by forwarding such copies to the office of counsel, John E. Shoop, Lake County Prosecutor, Lake County Court House, 47 N. Park Place, P.O. Box 490, Painesville, Ohio 44077, by United States Mail, postpaid, this 27th day of December, 1983.

Albert L. Purola

AFFIDAVIT REGARDING SERVICE

The undersigned, a member of the Bar of this Court, hereby certifies that he personally caused the documents in this case, to wit: the motion for leave to proceed in forma pauperis and brief opposing petition for certiorari, to be deposited in the United States Mail, first class postage prepaid and addressed to the Clerk of the Supreme Court, Washington, D.C. before 6:00 p.m., E.S.T. on December 28, 1983 at Willoughby, Ohio 44094.

Albert L. Purola
Counsel of Record
38052 Euclid Avenue
Willoughby, Ohio 44094
(216) 951-2323

Attorney for Respondent.

Sworn to and signed in my presence this 27th day of December, 1983.

Sharon B. Swartz, nbm
Notary Public

SHARON B. SWARTZ, Notary Public
STATE OF OHIO - (Lake County)
My Commission Expires Jan. 7, 1985

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Petitioner,

v.

KENNETH M. JOHNSON,

Respondent.

On Writ of Certiorari to the Supreme Court of Ohio

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Albert L. Purola
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38052 Euclid Avenue
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(216) 951-2323

Attorney for Respondent.

CASE NO. A-275

IN THE
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THE STATE OF OHIO,

Petitioner,

v.

KENNETH M. JOHNSON,

Respondent.

Pursuant to Rule 46 of the Rules of this Court, the respondent moves this Court for leave to proceed in forma pauperis.

The respondent has been incarcerated for over three years and has had no income during that time. Mr. Johnson has had retained counsel in the state court system, but that was financed by a relative who is no longer willing or able to retain a lawyer and has no obligation to do so.

The history and attached Affidavit demonstrate that Mr. Johnson can proceed in this Court only under the provisions of Rule 46.

Albert L. Purola
Counsel of Record
38052 Euclid Avenue
Willoughby, Ohio 44094
(216) 951-2323

Attorney for Respondent.

CERTIFICATE OF SERVICE

I hereby certify that the requisite number of copies of the foregoing Motion for Leave to Proceed in Forma Pauperis have been served on the petitioner, State of Ohio, by forwarding such copies to the office of counsel, John E. Shoop, Lake County

Prosecutor, Lake County Court House, 47 N. Park Place, P.O. Box 490, Painesville, Ohio 44077, by United States Mail, postpaid, this 27 day of December, 1983.

Albert L. Purola

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

NO. A-275

THE STATE OF OHIO,

Petitioner,

vs.

KENNETH M. JOHNSON,

Respondent.

AFFIDAVIT IN SUPPORT OF MOTION
TO PROCEED IN FORMA PAUPERIS

I, Kenneth M. Johnson, being first duly sworn, depose and say that I am the respondent in the above entitled case; that in support of my motion to proceed on appeal with being required to prepay fees, costs, or give security therefore, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefore.

I further swear that the responses I have made to the questions relating to my ability to pay the cost of prosecuting this petition are true.

I am not presently employed and have not been since 1980. I have been incarcerated in the Ohio State Reformatory or the Ohio State Penitentiary since November, 1980.

I have not received any income from any source during this time.

I do not have any savings nor do I own any property, either real or personal.

Kenneth M. Johnson

Kenneth M. Johnson

Sworn and subscribed to before me this DEC 19 1983 day of _____, 1983.

CLARENCE E. PFEIFER
NOTARY PUBLIC, STATE OF OHIO
MY COMMISSION EXPIRES FEB. 25, 1988

Clarence E. Pfeifer

Notary Public